UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS MARSHALL DIVISION

NETLIST, INC.,)
Plaintiff,))
VS.) Case No. 2:21-CV-463-JRG
SAMSUNG ELECTRONICS CO., LTD.,) JURY TRIAL DEMANDED
SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG SEMICONDUCTOR,) Filed Under Seal
INC.,)
Defendants.	
)

PLAINTIFF NETLIST INC.'S SUR-REPLY TO SAMSUNG'S DAUBERT MOTION AND MOTION TO STRIKE EXPERT TESTIMONY OF DAVID KENNEDY (DKT. 205)

TABLE OF CONTENTS

		<u>Page</u>
Α.	Mr. Kennedy Apportioned to the Incremental Benefits of the Patents-in-Suit	1
В.	Mr. Kennedy Properly Uses Licenses to Inform the Hypothetical Negotiation	2
C.	Mr. Kennedy's Opinions Comply with the Court's Discovery Order	4

TABLE OF AUTHORITIES

	Page(s)
Cases	
Bio-Rad Lab'ys, Inc. v. 10X Genomics Inc., 967 F.3d 1353 (Fed. Cir. 2020)	3, 4
Finjan, Inc. v. Secure Computing Corp., 626 F.3d 1197 (Fed. Cir. 2010)	4
Monsanto Co. v. Ralph, 382 F.3d 1374 (Fed. Cir. 2004)	2
Powell v. Home Depot U.S.A., Inc., 663 F.3d 1221 (Fed. Cir. 2011)	1
Prism Techs. LLC v. Sprint Spectrum L.P., 849 F.3d 1360 (Fed. Cir. 2017)	1

A. Mr. Kennedy Apportioned to the Incremental Benefits of the Patents-in-Suit

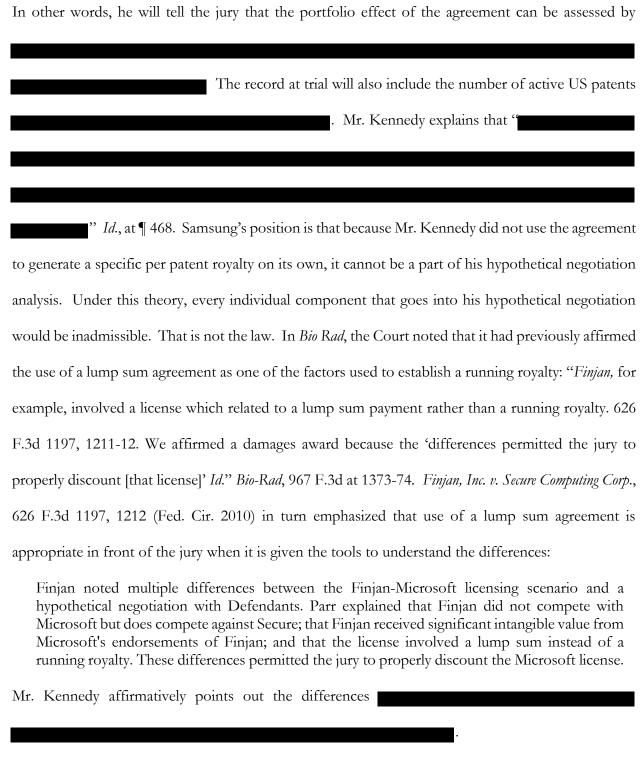
Mr. Kennedy apportions to the value of the patents-in-suit through his technical benefit
analysis. ¹ Separately, Mr. Kennedy considered whether the parties at the hypothetical negotiation,
having determined the apportioned value of the patents-in-suit, would split that value amongst
themselves. Mr. Kennedy reviewed the available evidence and determined that
Dkt. 252 at 11 (Mr. Kennedy also runs alternative
scenarios in which there is negotiating over the amount solely related to the technical benefit of the
patents). Samsung's damages expert also agreed that Netlist is entitled to
. Ex. 1 at 294:10-15 ("

VirnetX is inapposite to the issue of the bargaining split here. There, the Federal Circuit held anyone invoking the presumption that 50% of profits goes to each party "as applicable to a particular situation must establish [a] fit." Id. at 1332. In that case, the assumption was "insufficiently grounded in the specific facts of the case." Id. at 1331. Here, Mr. Kennedy's analysis is based solely in the facts of the case and not in any bargaining theorem. And once technical apportionment has occurred, a defendant is not entitled to any share. Prism Techs. LLC v. Sprint Spectrum L.P., 849 F.3d 1360, 1376 (Fed. Cir. 2017) is on point: "A price for a hypothetical license may appropriately be based on consideration of the costs and availability of non-infringing alternatives and the potential infringer's cost-savings." The defendant was not entitled to any of this cost savings. Mr. Kennedy identifies the

¹ Samsung's argument that damages should be capped by Samsung's profits is foreclosed by the Federal Circuit. *Powell v. Home Depot U.S.A., Inc.*, 663 F.3d 1221, 1238 (Fed. Cir. 2011) ("[I]t is settled law that an infringer's net profit margin is not the ceiling by which a reasonable royalty is capped.").

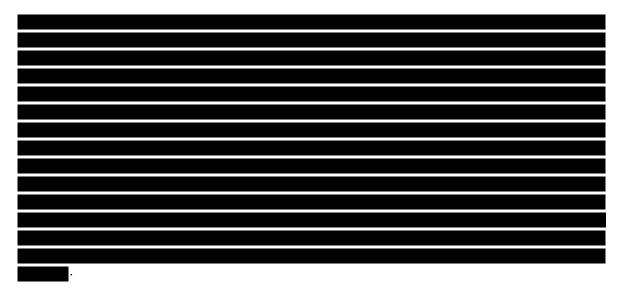
Moreover, Mr. Kennedy explains that Netlist has
which would impact the hypothetical negotiation. Ex. 2 (Kennedy Rpt.), ¶ 576. The
Federal Circuit has held that "where, as here, a patentee is unwilling to grant an unlimited license, the
hypothetical negotiation process has its limits," and thus an infringer should have no expectation of
profit. Monsanto Co. v. Ralph, 382 F.3d 1374, 1384 (Fed. Cir. 2004).
Samsung's next argument regarding Mr. Kennedy's use of next-best alternatives makes no
sense. ² First, if Mr. Kennedy's next-best alternatives are not commercially acceptable, that would only
render his opinion conservative. It would mean that only worse alternatives (or no alternative at all,
given that Samsung did not identify any during discovery or in opening reports) would have been
available to Samsung, and thus Samsung would lose even more money by not being able to offer the
patents-in-suit. Second, throughout his report Mr. Kennedy makes clear that his analysis is based on
commercial availability. E.g., Ex. 2, ¶ 599 ("
).
B. Mr. Kennedy Properly Uses Licenses to Inform the Hypothetical Negotiation
Both Netlist's technical expert and damages expert identified the
. As Mr. Kennedy notes,
. As wir. Reinledy notes,
. Id. ¶ 466. The
Accused Products in the litigation that resulted in the license were S/DRAM "memory components
² Samsung's footnote 1 is incorrect.

and/or memory modules; and/or SDR and/or DDR Controllers." Ex. 3 at 3:27-4:1.
Mr. Kennedy . Ex. 2, ¶ 466. And
the license agreement grants rights to "Ex. 2, ¶ 390. To
describe the agreement as strikingly similar to the Samsung/Netlist relationship is an understatement
The Federal Circuit holds that one of the primary elements of comparability is "assessing whether the
license arises under comparable circumstances as the hypothetical negotiation." Bio-Rad Lab'ys
Inc. v. 10X Genomics Inc., 967 F.3d 1353, 1374 (Fed. Cir. 2020). Dr. Mangione Smith
Under the section "Comparable Licenses," he
. Ex
4 (MS Opening Exx C) at ¶¶ 133-143. Samsung's technical expert likewise spent 8 pages of his report
identifying Ex. 5
(McAlexander Rebuttal Report) at ¶¶ 689-700. Mr. Kennedy relies on a technical opinion from
Ex. $2 $ ¶ 465. He concludes that the
Id. ¶ 463. He identifies
Id. ¶ 464. He opines that the relationship between
as discussed above. <i>Id.</i> , ¶ 466. He then takes steps to account
for the fact that the $(Id., \P 467)$:



C. Mr. Kennedy's Opinions Comply with the Court's Discovery Order

Netlist disclosed its technical benefit theories in its interrogatories before fact discovery ended and before depositions of its corporate representatives on damages. Ex. 6 at 38-39:



Netlist's 30b6 witnesses provided even more detail. Ex. 7 (Milton) at 10 and Ex. 8 (Hong) at 1:



Dated: March 3, 2023

Respectfully submitted,

/s/ Jason Sheasby

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CERTIFICATE OF SERVICE

I hereby certify that, on March 3, 2023 a copy of the foregoing was served to all counsel of record.

/s/ Jason Sheasby
Jason Sheasby

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

I hereby certify that the foregoing document and exhibits attached hereto are authorized to be filed under seal pursuant to the Protective Order entered in this Case.

/s/ Jason Sheasby
Jason Sheasby